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Evolution of the criminal trial system in the Anglo-Saxon system through the abuse of process doctrine

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Abstract: This paper aims to highlight some fundamental ideas for the abuse of the process doctrine in the Anglo-Saxon system. The common law, through a complex theory of the process doctrine, is totally based on the principle of fairness. However, the fair trial is also based on the theoretical foundations of a perhaps distorted trial. In this case, the accused is not in a position to fully exercise his faculties and related rights. The moral integrity of this system seeks to ensure a rigid core for an essential type of guarantees, where the overall fairness of the proceedings represents an end to any procedural means that is oriented.

Keywords: abuse of process; Anglo-Saxon system; common law; fair trial; ECHR; ECtHR; double jeopardy; procedural remedies; criminal exercise; criminal accusation; entrapment; lost or destroyed evidence; adverse publicity; breach of promise.

Introduction

When we talk about abuse of process doctrine we immediately refer to and think of the Anglo-Saxon procedural law as "the topic" that must be taken seriously in order "to preserve the welfare of the system" (Bray, 2007). The paradox is that the abuse of process originates in the civil trial where the Anglo-Saxon legal system presents itself as a form of remedy for an action of various procedural instruments (Winfield, 1921; Mason, 1983; Jacob, 1990; Fox, 1990; Jolowicz, 1990; Blake, Browne, Sime, 2012; Roberts, 2012; Keane, Mckeown, 2014; Sine, 2016)[1].

The question is whether the Anglossasone system can be connected with the jurisprudential system, that is outside of legal avenues of a positive nature. And all this happens because the expression is based on the criminal trial (Choo, 2008).

The essence of the abuse of process doctrine in a discreet, specific way thus concerns a model that reacts to the accusation, i.e. the public prosecutor. A practice that consists of stopping criminal proceedings which is often called abuse of process discretion. A discretion that has double value on the abuse of the

1See especially the next cases: R v. Forbes, ex p Bevan, [1972], 127 CLR 1, 7, per Menzies J; Taylor v. Taylor, [1979], 143 CLR 1, 6, for Gibbs J.; Castro v. Murray, [1875], LR 10, Ex 213; Asmore v. British Coal Corporation, [1990], 2 QB 338, 348; Bhamjee v. Forsdick Practice Note, [2003], EWCA Civ 1113, [2004], 1 WLR 88, 33; Laing v. Taylor Walton, [2007], EWCA Civ 1146, [2008], PNLR 11, 303; Jameson v. Central Electricity Generating Board, [1998], QB 323, 344.

process in some directions.

The first path is that of prosecutorial discretion where the impediment of the Prosecutor's discretion to continue with the criminal action is directly noted, thus resolving the intolerable prejudice of the accused by compromising the fairness of the procedure. On the other hand, the power-duty of the intervention of a judge in the face of abuses by the public sector appears to be an element that has to do with jurisdiction.

In this case we talk about judicial discretion, which is defined as the quintessence of common law, i.e. the identification of justice. The concepts are, however, distinct. On the one hand we have the discussion of the discretion of the prosecution in the exercise of its functions and on the other hand the connection with jurisprudence.

From a theoretical point of view, the abuse of process shows the conception of judicial discretion which does not include prosecutorial discretion at the origin of this notion. According to the jurisprudence, there is no reason to invent a remedy that is discretionary in nature other than the need to reject an abuse of discretion by the prosecution.

The stopping of proceedings by the judge as a consequence of abuse of process is an exercise of discretionary power because:

"(...) the word "discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there

is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not (...)" (Ashworth, Redmauyne, 2010; Tapper, 2010; Sanders, Young, Burton, 2010; Roberts, Hunter, 2012; Dubber, Dubber, Törnle, 2014)[2].

From a dogmatic point of view, the concept of discretion in the abuse of process has a methodological nature. The conduct that constituted an abuse constitutes an operation of a discretionary nature which is incapable of forming a number that is evaluated on a case-by-case basis (fact-finding approach). Thus we note the reaction to the abuse which ascertains the compromise of fundamental interests of the penal system, establishing a duty for the judge (Dennis, 2014; Pitcher, 2017)[3].

This methodological approach translates the impossibility of tracing real paradigmatic cases to the abuse of the process. The guidelines indicate the opposite, thus showing a progressive effort by the Anglo-Saxon jurisprudence system towards applicative and interpretative paths which characterize the setting of standards of rules to a symptomatology of abuse which is part of a limited number.

Within this context, the discipline evolves as an open container given that in practice the prosecution at a given moment can deprive the sanction by changing the jurisprudential direction and falling back into a specter of abuse of process. The abuse of process and discretion are elements that constitute a dual path.

2R v. Carroll, [2002], HCA 55, par Gaudron and Gummow JJ.

3Hunter v. Chief Constable of West Midlands Police, [1982], AC 529, par Diplock J.

On one side the prosecution and on the other the jurisdiction.

The jurisdiction attempts to place the subjective situation of duty (Choo, 2008; Ter Haar, Laney, Levine, 2016)[4] by verifying the judicial obligation that it observes. The ways that are available to characterize this dogmatic category impose the relative sanction intervening as a protection tool that involves the law and the operation of balancing conflicting interests in close collaboration with the specific context essentially as discretionary power (Sloan, 2015)[5].

The normal course of procedure provides that the judge should ascertain the basis of the punitive sanction that:

"(...) any criminal charge should proceed to full trial, and it is only in the most exceptional circumstances (...) the court should exercise its undoubted discretion to prevent such a course on the basis that the proceedings amount to an abuse (...)"[6].

The prosecution has discretionary power by bringing the prosecution to a court where the accused examines the merit of the accusation corresponding to an obligation in principle. Thus a foundation of public interest is built which represses crimes and punishes the guilty.

By slipping from criminal action (abuse) the prosecutor tolerates exceptional situations calling for the sacrifice of the system of

4R v. Horseferry Road Magistrates' Court, ex p Bennett, [1994], 1 AC 42, 74, for Lord Lowry.

5R v. Martin, [1998], AC 917, 926; R v. Burns, [2002], EWCA Crim 1324, [27].Jones v. Kernott' [2012] Conveyancer & Property Lawyer 159; J Mee 'Jones v. Kernott: Inferring and imputing in Essex' [2012] Conveyancer & Property Lawyer 167.Chaudhary v. Chaudhary [2013] EWCA Civ 758, [2013] Family Law 1257.

6In this sense see: CPS v. Tweddel, [2001], EWHC Admin 188, [2002], 1 FCR 438, [6].

justice by subjecting the accused to suffer as the procedure continues with the risk of being definitively convicted.

The birth of a remedy

When we talk about remedy we mean the power-duty that a judge had to block the trial process when the accusation is in the hands of the public prosecutor. In the European legal system, abuse finds its birth as a tool that reacts to the comforts that the accused and his defender find during the trial and before. The abuse of the process comes to protect a judicial machine which concerns the celebration of the trial first of all in a reasonable time, leading to the denial of a legitimate faculty in an abstract way.

We must take into consideration that the abuse of process theory has guarantee as its main character. The guarantee to an Anglo-Saxon system of criminal action constitutes an option for the public prosecutor by concretely selecting the persecution given that the need for possible deviations does not follow a designed system. Thus the discretion regarding criminal action and arbitrariness is found at such a thin border subjected to a scrutiny that is resolved in a way that is intolerable to the accused and to the total system as a whole.

As a first precautionary protection, we consider the safeguard clause where, under objective and/or systemic needs, the

procedural machinery and the nationality of its functioning are effective, finding protection, for the Anglo-Saxon system of abuse, in an indirect way.

From a value point of view, the parameters are different, given that the power-duty of punishment revolves around two concrete cycles, that are connected and must remain in full balance. On the one hand we have persecution which is a claim of criminal facts and on the other hand the fairness of the process, that is an indisputable guarantee.

From a jurisprudential point of view, we note the R v. Connelly, [1964], AC 1254, 1296 case, which imposed the problem of symptomatic cases of abuse of process, as limits on the boundaries of operation and the double jeopardy rule. Prohibiting double judgment does not provide the accused with comprehensive protection but establishes a second judgment for the same fact, which is strictly connected to what occurred in the coverage area of the rules that are involved, thus prohibiting the same legitimacy under certain conditions, where the judgment is presented as unjust and which concretizes the morality of every democratic justice system.

The power-duty reacts to a behavior, that is not incorrect on the part of the prosecution but limits itself to stopping the progress of a procedure, extended even when the trial begins through a technique inherent in the contents of the duty-power. Thus the

jurisdiction offers us an inherent power, which is capable of discussing the prosecution of the accusation by granting the judge to:

"(...) prevent a trial from taking place [in the exercise of its] residual discretion (…). Are the courts to rely on the executive to protect their process from the abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The court cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused (...)" (Pattenden, 2009).

By legitimizing the jurisdictional attribution we put into practice a residual clause which is implemented in exceptional circumstances having as its main difficulties the application and identification which the appeal of power inevitably poses.

When the accusation is brought, the method of verification of the duty is continued which resolves the alternative, that is guilty or not guilty. This path excludes some exceptions of a fundamental nature. Such as for example the objective obligation which is no longer valid and which:

"(...) - the criminal action is inadmissible; - it falls within the area of direct operation of the double jeopardy rule (autrefois acquit or autrefois convict); - it is an order of non-continuation of the criminal action by the Attorney-General (so-called nolle prosequi); - there is lack of jurisdiction of the court seised (...)" (Sloan, 2017).

The anti-abuse clause also constitutes a certain exception, that is added to the previous ones that are traditionally accepted by jurisprudence in the Anglo-Saxon system and within its limits in the exercise of the ius dicere (Pattenden, 1985; Pattenden, 1989; Owusu-Bempah, 2014)[7].

7R v. Chairman, County of London Quarter Sessions, ex p Downes, [1954], 1 QB,

The essence of the final sanction under analysis is looked at from a visual angle where the remedy for a genetic defect of the action is exercised by the public party. Thus, the jurisdiction is based on a specific discretion of the prosecutor himself and it is up to him to choose a real trial where the incorrectness of the action does not invalidate the opportunity of the action but the precision for the fairness of the trial. Only in these cases the continuation must be archived and stopped.

From a technical point of view we also have the problem of stopping criminal proceedings, the so-called stay in the Anglo-Saxon system. This is a system that requires a residual clause where the judge can order not to proceed with the action. A reality that we do not find in all penal systems. This is a difficult alternative to conviction and/or acquittal which notes in detail what the law says and leads to nothing but an approach to the remedy we are examining.

From a material point of view it is difficult to understand the arrest of the proceedings given that the trial has an end expressed by the judge. So it can go on the accusation of proposing the appeal. Given the technical nature of the issue, the path towards acquittal is inevitable, as the accused has the benefit in this case from both rulings. The stay of the proceeding and the acquittal are distinct objects. The first is distinguished

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from the typology of the judicial ruling, which shares the margins of affinity (verdict of not guilty), also stating that:

"(...) a defendant arraigned on an indictment or inquisition pleads not guilty and the prosecutor proposes to offer no evidence against him, the court before which the defendant is arraigned may order that a verdict of not guilty shall be recorded without any further steps being taken in the proceedings, and the verdict shall have the same effect as if the defendant had been tried and acquitted on the verdict of a jury or a court (...)" (Owusu-Bempah, 2011; Gillespie, Weare, 2017)[8].

The acquittal and verdict of not guilty are assimilated by the law with regard to the effects that follow one's pronouncement , i.e. the ne bis in idem. With the arrest of the proceedings, we share in a clearly methodological way the real verification, that characterizes the acquittal, where the accused is recognized as not guilty, after the investigation and the evaluation by the jury.

If this were the case, the path of discretion distinguishes between the non-prosecution of the abuse of process and the rulings, that constitute the consequential effects. Thus, only acquittal and/or the verdict of not guilty can follow the prohibition of double judgment, which we call the jeopardy rule. It is, thus, something similar but not at the same time the same. Since the authorization of the court is needed, the establishment of a second trial of the arrested person verifies the abuse of the process which constitutes an abuse of the process due to the identity of the relevant consequences. We do not exclude an outcome, that has an alternative nature, i.e. that the prosecution

8Criminal Justice Act 1967, Section 17.

cannot prove a certain result against the accused, i.e. no case to answer. Thus, the accused is the beneficiary of a verdict of not guilty but with a total operation of the principle of ne bis in idem (Pattenden, 1985; Pattenden, 1989; Pattenden, 2009; Owusu-Bempah, 2014)[9].

Abuse and imbalance of powers: enforcement and jurisdiction. Who win?

By investigating the abuse of process we also involve the very problematic relationship between jurisdiction and judiciary. Thus we must face the problem, which according to the Anglo-Saxon system, includes the relationships between jurisdiction and executive power (Choo, 2008). Interference in the application of abuse has larger dimensions, highlighting the discussion between discretion in the exercise of executive power[10].

The abuse of the process as a discretionary system responds to distortions that have to do with prosecutorial discretion. The connection between them has an aspect that has to do with the overall reconstruction of a system, which perhaps follows the path of a criminal proceeding and takes as its presupposition the disloyal conduct of the prosecutor, thus leaving the action to the executive, i.e. to the Crown Prosecution Service, thus, directly

9R v. Thompson, [2006], EWCA Crim 2849, [2007], 1 WLR 1123.
10See the observations of Viscount Dilhorne, in DPP v. Humphrys, [1977], AC 1.

blocking the opportunity to go to prosecution proceedings, which will be inappropriate.

The abuse of the process constitutes a dystonia with the adversary trial following the criminal action, i.e. the relationships between the prosecution and the judge and what happens in the courtroom (Durston, 2011)[11].

It is relevant that the conditions for the abuse of the process and the application of the relevant imposed sanction occur externally. Every jurist is used to dealing with the principle that is separated into phases, i.e. the discussion of the impervious ground as extra moenia, playing with the neutral mentality of the judge, i.e. the jury.

Thus, we distinguish the conduct of the Prosecutor (prosecutorial misconducts) after the procedural moment and of the judge who has the power to intervene, which dates back to the Police and Criminal Evidences Act of 1984; Gillespie, Weare, 2017), as a step of correctness[12], where the discussion does not concern the phases prior to the trial but the axioms of the system, that inform the judge of the relevant investigation terrain (Glover, 2015)[13].

11Collier v. Hicks, [1831], 2 B & Ad 663, 668, 670, 672.

12R v. Kalia, [1974], 60 Cr App R 200, 211; R v. Maynard, [1979].

13Cr App R 309, 317-8; R v. Olivia, [1965], 49 Cr App R 298; R v. Tregear, [1967], 2 QB 574; R v. Roberts, [1985], 80 Cr App R 89.

The setup of a system from a pre-trial point of view in the courtroom, according to the Anglo-Welsh system, is based on the responsibility of the body, that is responsible for investigations. We remember the Prosecution of Offenses Act of 1985 (Gillespie, Weare, 2017), which from a legislative point of view, tried to change the scenario given that it gave the Crown Prosecution Service, i.e. state officials, responsibility for criminal proceedings after the decision of the police, thus, having the choice to initiate criminal proceedings by attributing to the state official the power to conduct the relevant investigations and carry out criminal proceedings.

The legislation just cited refers to the relationships between prosecutors and the police as new structures, that are introduced in the establishment of a criminal proceeding, which examines the reasons that go beyond the ends of justice in a vexatious manner. Thus, tools are foreseen, which have a direct nature to abuses of this type, and the Director of Public Prosecutions has the right to order in the preliminary stages the interruption of the criminal proceedings (Gillespie, Weare, 2017)[14] recognizing reasons, that are inappropriate for the continuation of a process, as this mechanism seeks to eliminate any potential profile of responsibility for the police chief and the hypothesis of abuse of process (Bennion, 1986; Lidstone, 1987; Gillespie, Weare,

14Prosecution of Offences Act (1985), Section 23.

2017)[15].

The path of ascertaining the abuse of the process, by the judge, does not ignore the knowledge of the verification of the process, from an external point of view, but is in contrast with the fundamental axioms of an accusatory process. The exercise of the action establishes the exclusive attribution to the public prosecutor in the act holding the impulse whenever control of the jurisdiction is established.

he de iure condendo, to the chief judge of the power to stop the criminal process in the early stages, is based on the unfair abuse, that proceeds further and is not in conflict with the mandatory exercise of the criminal action at the moment it is exercised. Faced with an ex ante control mechanism, the order has the opportunity of the act of exercise, which conflicts with the fate of the relative declaration of illegitimacy. The existence of a sanctioned obligation excludes invasion from the outside of the act of impulse, making ex post judicial control function, as a guarantor of criminal legality and of its own ends.

The judicial discretion

The judicial discretion constitutes an important element for understanding the framing of the essence of procedural abuse, in the Anglo-Saxon system, as an actio finium regundorum, where

15See in matter the Prosecution of Offences Act (1985).

the judge's discretion serves to create a compromise between reasonable requests and the identification of a abstract rule, as containment of authoritative power.

This is a discretion that is based on the concept of the rule of law. Thus, a written rule is identified, where the prescriptive content has a rigid nature and takes the form of elements, that follow in a predetermined way the possibility for the judge to orient himself in the choice of a precise solution through what the law pre-establishes (Schneider, 1992; Gleeson, 1995; Sunstein, 1995; Gelsthorpe, Padfield, 2012). Discretion is necessary for judicial activity. The rigidity of the rule of law guarantees legal certainty by providing a margin for the adoption of solution practices, that foresee the effects of behavior in a specific case, where:

"(...) rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is the need for individualized justice (...)" (Gelsthorpe, Padfield, 2012).

Judicial discretion focuses on the identification of the essence. The judicial discretion, we can say, has a decision-making power that overrides the law (totally unfettered power). A certain behavior A, where the judge deviates from the prescription of the law, follows a legal command, where he autonomously elaborates a solution B (Choo, 2008).

This is a connection, which has a subjective, hypothetical nature. This type of rigid values also tends to derogate, balance,

the interests of sign, which have an adversarial nature. This adoption involves an eventuality, where the abuse of a process is unfair and so the abuse of process is configured, as the stopping of a proceeding, where the judge can also depart.

The discretionary capacity is attributed to the judge starting from an operational margin that provides the law with an identification (open-texturedness) of an abstract content, i.e. a setting that entails the freedom for the judge to have the choice of choosing or not the final precept:

"(...) a discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito iustitiae once facts are ascertained (...)" (Morissette, 1984)[16].

These are arguments, that, sufficiently and usefully, anticipate any analysis of the object, thus, anticipating judicial discretion, as a natural element to the theory of abuse, which conceives the power-duty dimension of the judiciary.

In such a case, the judge has wide margins of maneuver for the reconstruction of situations, which legitimize the adoption of remedies, that are established not by jurisprudence but by doctrine, as a diagnosis of symptomatic situations, that give a positive outcome to obligations, i.e. the application of the sanction and as a consequence the conclusion of a proceeding.

16Evans v. Bartlam, [1937], AC 473, 489 per Lord Wright.

The qualifying elements of the logical-juridical-doctrinary position

Speaking of elements that constitute the abuse of process we mean the judicial objectives. Case law allows us to note:

"(...) the jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities: -Cases where the court concludes that the defendant cannot receive a fair trial; -Cases where the court concludes that it would unfair for the defendant to be tried. In some cases of course the two categories may overlap (...)"[17].

It is immediately clear that there are some parameters that we must take into consideration. The first is that the trial is false from the beginning. In this case we find ourselves contrary to fairness and the accused is not in a position to exercise a certain defense from the beginning of the proceedings. In a second stage, the fairness of the trial is linked to the ability of each defendant to process and continue the punitive exercise despite it being contrary to the moral integrity of the justice system.

On the one hand we have an unjust conviction coming from a political system that tends to protect the functioning of the judicial process, thus avoiding the conviction of an innocent person. On the other hand we have the image of an ethical integrity of a justice system, where the risk of convicting an innocent person remains non-existent and in connection with the continuous procedural process.

In a second operational stage, the verification of abusive

17R v. Beckford, [1996], 1 Cr App R 94, 100-1.

conduct, on the part of the prosecutor, is a parameter that refer to having meta-legal bases. Within this reasoning it is stated that:

"(...) the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors' conduct (...). The court's inquiry is directed more to the prosecutors' behaviour than to the fairness of any eventual trial (...) if it is satisfied that it would not be fair to allow the proceedings to continue, the court does not then concern itself with the possibility that any ensuing trial might still be a fair one, because it will have formed the prior view that it would not be fair to the defendant if it were to take place at all (...)" (Owusu-Bempah, 2011; Jackson, Summers, 2012; Denyer, 2012; Mulcahy, 2013; Mcewan, 2013; Henderson, 2016; Loughnan, 2016; Mackay, 2016; Fairlough, 2017; Kirby, 2017; Owusu-Bempah, 2017; Fairlough, 2018; Liakopoulos, 2019a)[18].

The objective evaluation of a fair trial is possible and focuses on a subjective coefficient of the bad faith of the prosecution. The needs of procedural guarantees and the morality of a system are complementary. These are various interpretative nuances of the principle of "Legitimacy and Fairness". So we can talk about various facets of fairness and above all between the needs of a system that has to do with morality and subjective guarantees. And so the following question arises: How can we address fairness in a criminal trial?

Perhaps in this case fairness is comparable with loyalty and correctness. But is it so? On the other hand, the technical-legal profile corresponds to fairness. Thus, we note a scenario of a dialectical nature, on the obligation of loyalty, of the parties, where the need to respect the rules of the game presents itself, as

18R (Ebrahim) v. Feltham Magistrates' Court, [2001], EWHC Admin 130, [2001], 1 WLR 1293, 20.

a safeguard of the fundamental guarantees for the accused, in criminal proceedings. Accordingly, the ethical matrix of this principle is framed within the technical circle.

Thus, we have a new datum, that is the concept of fairness, which makes the national jurist deal with the difficulties in a general way in the face of abuse, which is found in the common law system. In such a case, the upstream legality assists in establishing instances, that have a moral character in the justice system in the right of defense, which are inevitable in the general classification of this type of problem. This serves to clarify the relative content which moves from the reference to a fundamental principle in the theoretical field, which in this case we call it anti-abuse.

The principle of legitimacy, in the Anglo-Saxon system, represents the ius dicere of a criminal justice system, which is based on the idea that the jurisdiction finds the duty to protect two essential interests legitimate. On the one hand, the protection of an innocent person from being condemned in an unjust manner and on the other hand, to protect the moral integrity of the entire system (Zuckerman, 1987).

An unjust conviction refers to the conditions of the accused and the probability of reaching a verdict of guilt equivalent to that of conviction. Thus, we talk about equality of arms, which is impossible to have a logical basis given that the criminal trial

begins and is based on a mismatch of the accused's various accusation plans and which prepares a more adequate defense. The principle of legitimacy is broad and takes the form of a more practical operational path, that guarantees the outcome of the process, which is equivalent to any conduct, that undermines any ideal of balance and which must be denied.

On the other hand, public power, as the foundation of jurisdiction, and the repression of crimes, are part of the collective spirit of justice, as public confidence. Thus, the justice system is freed from the ethical control of the community and the crimes are independent of the requirements of procedural fair play which implies that the accusation is based on good faith and loyalty. As well as, the evidence of the parties, constituting a counter-limit to an exercise of punitive power, will exceed jurisdiction and justice.

Hence, the two operational poles, namely unfair trial and unfair to try, find a link that identifies the basis of the operation. The principle of legitimacy corresponds to fairness, where the initial conditions of a procedure, are guaranteed, with minimal terms, so that the probability of conviction responds to the absolution of the danger of an unjust conviction, i.e. conviction of an innocent person. If the trial is unfair, the lack of legitimacy can be linked to the condemnation of the public party. In consequence, it is not a fair trial and the magistrate's conduct is

contrary to the principle of fairness.

The claim to punish is also unjustified from a moral point of view. But on a practical level, the technical operation, in the Anglo-Saxon system, evaluates the opportunity, that tends to paralyze the proceedings of an abuse of process. It serves to verify some precise conditions, namely the protection of the not guilty from unjust convictions and above all when the first evaluation gives a positive outcome; the interest of repression by guilty parties and the interests that do not conflict with the moral integrity of a system.

The application of abuse of process is possible when the accused is innocent and is convicted and the prolongation of the procedure constitutes the ethical image of justice, i.e. a collective trust and why not, a cornerstone protection of democratic justice in every country that serves justice in a correct and moral way (Emmerson, Ashworth, Macdonald, 2012; Spencer, 2016)[19].

The principle of legitimacy and the theory of abuse of process build in practice and arrive at a delineation of the system of procedural fairness, thus representing the mediation of a teleological projection of a criminal trial that respects the

19R v. Griffin, [2001], 3 NZLR 577, (2001) 19 CRNZ 47 (CA), per Richardson P, Blanchard and Tipping JJ at para 40; R v Forbes, [2001], 1 AC 473, [2001] 2 WLR 1 (HL); Brown v. Stott, [2003], 1 AC 681 [2001] 2 WLR 817 (PC); Randall v. R, [2002], 1 WLR 2237 (PC) [2002] UKPC 19 at para 28; Montgomery v. HM Advocate, [2003], 1 AC 641, [2001] 2 WLR 779(PC).

defensive guarantees of the protection of the innocent from sentences that are unfair.

The absoluteness of the rules are rigid to found a balancing judgment with certain values (Mathias, 2004). Any form of balancing test escapes compression of the effect of any counterweights that have a value basis[20]. Overally, the operation becomes illogical and unsustainable for a designed system that denies fairness, i.e. the main foundations of criminal jurisdiction.

What are the intermediate solutions? What are the options of last resort?

The solutions for stopping the proceedings, due to abuse of process, perhaps have to do with exceptional reasons. Needs that are linked with criminal jurisdiction and the repression of crimes towards a total solution. As intermediate solutions are those that provide protection in the "extreme" sanction and/or perhaps to a non-sanction.

There is no general rule for defining abuse, leaving the practice of concretizing the operational methods[21] without abstracting the situations, that require the remedy of last resort, i.e. the reasoning that is not linked to the abuse of the process but to

20R v. Narayan, par Glazebrook J, HC Auckland T 2902: "(...) the balancing of probative value and prejudicial effect (…) is at the heart of the discretion to admit or exclude evidence (...)".

21Watson v. Clarke, [1990], 1 NZLR 715, (1988) 3 CRNZ 67, par Robertson J.

technical situations, that are connected in time, with the concept of fariness and which are related to the operational rules, which seek to govern the development of the process and the modulation of any prejudice, which is affected by the regulations of a hermeneutic nature (Paciocco, 2001).

This reconstruction of cases in jurisprudence requires stopping the proceedings. It is a matter that dominates the object, that is present, in an interpretative way. Thus, the prejudice derives from the abuse to the accused. This presents itself as the synotmatic element and is the criterion that gives the opportunity for an intervention by the jurisdiction (Paciocco, 2001).

The solutions of arrest in the criminal trial resolve judicial interventions and the admission and exclusion of evidence. The interest of fairness finds fertile ground in the abusive behavior of the parties capable of compromising the procedural dialectic, the correctness of the equality of weapons in a trial and in the evidentiary one.

In the Anglo-Saxon system, the judicial process of evidence follows the rules of admission, the acquisition of evidence and the final evaluation in a diversified way. Remedies of an alternative nature to the most rigorous sanctions are possible with the exclusion of contaminated evidence (exclusion of tainted evidence) and protect the judge from the jury (judicial

warning) thus giving the weight to attribute to the evidence, the precise meaning he assigns to it (Mathias, 2004)[22]. As a consequence, the exclusion of evidence presents itself as a solution that respects the stopping of a proceeding.

The key principles of the adversarial trial, in an Anglo-Welsh system, bring the evidence that is required, produced by the parties to a general prohibition of the judge's powers of intervention for obtaining and retrieving evidence of investigations (lawfully obtained) (Jackson, Summers, 2012)[23].

Exceptional circumstances are excluded, where the seriousness of the conduct places the public party in obtaining proof, excluding the stage of debate (Mathias, 1990; Jackson, Summers, 2012)[24].

This is a solution, that leads to exceptional rigor, given that it is difficult to clarify which cases justify the use of another solution, where hermeneutic declinations are part of debates in the halls of each court, in a wide oscillation of the choice that continues the tainted trial, due to incorrect conduct of the prosecution and the exclusion of the element of tainted evidence, which goes against its course[25].

22R v. Grace, [1989], 1 NZLR 197; R v. Sutton, [1988], 4 CRNZ 98 (CA); Mohammed v. The State, [1999], 2 AC 111, 123 (PC); R v. Buhay, [2003], 225 DLR (4th) 624, 2003 SCC 30.

23R v. Shaheed, [2002], 2 NZLR 377, 2002 19 CRNZ 165 (CA); R v. Grayson and Taylor, [1997], 1 NZLR 399; R v. Taylor, [1996], 14 CRNZ 426 (CA).

24R v. Dally, [1990], 2 NZLR 184, 1990 5 CRNZ 687.

25R v. Looseley, [2001], UKHL 53 (25 October 2001), 2001 4 All ER 897 (HL).

It is an orthodox system, that circulates around the interest, the object of the attack. The clarity, that plays into overall fairness, does not balance the essential elements of fairness, the absoluteness and inelasticity, that are insusceptible in the face of interests that can lead to contrary and antithetical results. If the opposing interest tends towards a less rigorous solution, the doubt remains, that the terms of reliability of a judicial prognosis are elements, that protect the accused from an unjust conviction, where the impartiality, not of the judge but for example of the jury, is not so much protected.

Here, too, we have some gaps. The weight, that the evidentiary element carries, excludes the final decision and the seriousness of the crime has as a consequence an emotional impact on each commission of jurors.

Alternatively, the attempt to justify the arrest of a judicial warning invites the judge and the jury to have a double meaning. On the one hand, the demonstrative weight of the evidence and the assignment of the correct evidence to the meaning has to do with a representative content. If this were the case, things become complicated because evidence is admitted and acquired and the judge would have to block the entry of the evidence into the relevant trial and deny admission. The evidence thus presented at trial acquires value in the sphere of knowledge of the jury panel.

The legality of the test itself and the moment of evaluation of the same are considered to be a simple caveat, where the jury provides a precise safeguard, that is part of procedural fairness. The exclusion of evidence raises doubts about the impartiality of the judge by denying the use of the relevant evidentiary data for objectives of the decision which do not erase the memory of those who have weight on the content. It must be noted that the risk of the conviction of an innocent person and the exclusion of evidence does not avert the risk of the word but the halt of a proceeding which will be a mandatory solution.

Cases from the Anglo-Saxon system

When we refer to cases of abuse of process in the Anglo-Saxon system we are faced with practical examples that do not exclude the practice that grows with the number of cases, such as procedural conduct and the phenomenology of abuse, that are symptomatic of the abusive practice.

The judicial assessment presents itself as a possibility where the accused benefits from a fair trial and continues a process, that resolves the moral integrity of justice, as a physiological fact-finding approach of precisely assessable cases that each of them brings useful elements to understand the peculiar declinations of substantial parameters of typical situations.

(Follows): The case of delay in criminal prosecution

In all democratic states, despite the fact that justice is full of laws and working judiciaries, the length is always excessive in nature and at certain times become endemic producing a systemic inefficiency (Birch, Taylor, 2003; Young, Summers QC, Corker, 2014). There are many reasons due to the heterogeneous nature of the problem which often seem physiological for a criminal proceeding and do not reach profiles inherent to the work of each judicial machine.

The framework of national legal terminology often goes out of bounds but is comparable in the common law system with the lack of fairness of the process. The defendant's claim to have a trial based on the fairness system in precise times is a perception that does not necessarily mean an unjust conviction.

The key witnesses, the lapse of time, the purposes of the defense strategy lead to the delay of a criminal trial, where the anti-abuse application is connected with the form of reason, which the criminal procedural system is based on a fault of the prosecutor due to the investigation being carried out by the police. Maybe that is the first reason, but is not always valid. First of all, the predetermined limits proposed by the legislator to modern systems precisely condition the procedural phases. The closure and rigidity of the terms of the proceedings allows us to safely identify the duration of the trial and define the

excessive length of the procedure as an endemic problem of justice, thus implying an overall iniquity while stating that:

"(...) some delay is inevitable. The question is, at what point does the delay become unreasonable? (...)"[26].

The abuse jurisdiction, in the Anglo-Saxon system, through a judicial discretion allows an empirical, oscillatory phase, which is part of the common law culture, thus ensuring individual guarantees and collective interests. Parliaments, from common law countries, have never legislated on temporal matters, on the phases of the criminal trial and above all on the working time until the prosecution of the prosecutor (Young, Summers, Corker, 2014) (Doak, Mcgourlay, Thomas, 2015; Singh, Ramjohn, 2016)[27].

In the sector, we recall the Magistrates' Courts Act 1980 ad hoc provisions on summary offences, i.e. offenses in general terms of gravity. Note section 172 which reads:

"(...) expressly provided by enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made , within six months from the time when the offense was committed, or the matter of compliant arose (...)".

The discipline directly establishes the references of procedural lengths, which are defined, through the codes of conduct for operators in the matter.

We also note the Code for Crown Prosecutors, which is issued by the Director of Public Prosecutions, based on the Prosecution

26R v. Smith, [1992], 2 SCR 1120, par Sopinka J.
27R v. Sawoniuk, [2000], 2 Cr App R 220, CA).

of Offenses Act 1985, s. 10) which establishes the relevant lines:

"(...) a) the crime is serious; b) the delay was caused, even in part, by the accused; c) the crime news was only recently learned from the authority; d) there have been long investigations due to the complexity of the matter (...)" (Liakopoulos, 2019a).

Equally important is the Attorney-General's Reference (No 1 of 1990) (Sprack, 2011), which refers to the issue of delay and the essential parameters of the delay and the conduct of the procedure, which results in a practice that is not tolerable for the accused. The delay also brings a very important element of responsibility, the length of the procedure, where the judicial machinery constitutes an acceptable systemic risk. In practice, according to the attorney general:

"(...) - if the arrest of the criminal trial could be ordered by the judge only on the basis of the objective delay in carrying out the criminal action and, therefore, independently of the circumstance the same could be a consequence of the prosecutor's culpable conduct; -if the answer is affirmative, what is the level of severity of the prejudice suffered by the accused capable of justifying the use of stopping the proceedings. In fact, neither the defense in court of a request to stop the proceedings, nor the judge who ordered it take into consideration two relevant elements: the responsibility for the delay in carrying out the criminal action which occurred; the extent of the damage that the accused would have suffered as a result of the length of time itself and that, in the event of prolongation of the procedural delays, he would continue to suffer (...)"[28].

The arrest of the trial is of an exceptional nature and the delay in the exercise of the action does not depend on behavior having to do with the accusation. There is a negative limit that has to do with the operation of the remedy, which ensures that the delay exclusively verifies the complexity, that can be attributed to the

28R v. Sawoniuk, [2000], 2 Cr App R 220, CA.

defense. The value of prejudice and the defense relating to the excessive length of the procedure operates on the abuse of the process, as a compromise of the rights of the accused, where the prejudice is usual and which is on the path of unfair trial-unfair to try.

The defendant has the burden of proof of a high probability, that the fair trial benefits from the delay to the severity of the harm of a continuation of the process. The exceptional nature of the remedy requires the judge to evaluate intermediate solutions, the non-admission of evidence, the necessary delay, the guidelines for the commission of the jury and the evaluation of the evidentiary elements.

Thus, the parameters are set, regarding the abuse of a process, that is oriented towards delay. The injury risks the defense being serious. The risk of an unfair trial, the passage of time, the value of the evidence create the danger of a conviction that is beyond reasonable doubt. The fair trial alleviates the crime which reaches the point of oblivion of the collective conscience without justifying the persecution. So, delay is an inevitable and certainly necessary evil.

The arrest of the criminal trial passes to a preliminary evaluation, to a prognosis of intermediate solutions. Of course the time comes out because of the prosecutor. As we have said, this situation does not constitute an arrest of the process. The

protection does not emerge from elements of conduct. However, it is relevant to the prosecutor and is of an atiological nature.

The subjective element of guilt is comparable with the intent of an accusation, which influences the reference of verification of an abuse. As a consequence, the terms of causation of delay and procedural unfairness arise as causes of procedural delay that have nothing to do with abuse. The unreasonable long lead times are physiological due to the difficulty of the investigations in finding new evidence, evaluating and checking the old ones without thus constituting an abuse of delay which is due to the behavior of the defence.

The distinction between documentary and oral evidence draws a line between trials which are based on documentary evidence and those which are based on oral evidence, such as sexual offences. And all this to try to clarify the connection with the opportunity to proceed with the termination of the proceedings due to the abuse of a contributory document, which does not arrive in time during the passage of time[29].

According to the jurisprudence:

"(...) the fairness of a forthcoming trial or where, for any compelling reason, it is not fair to try an accused at all (…) the proceedings must be brought to an end (...)"[30].

The influence of judicial practice hesitates to establish the

29R v. Buzalek and Schiffer, [1991], Crim LR 115, CA; R v. Central Criminal Court, ex p Randle and Pottle, [1992], 1 All ER 370, CA.

30Spiers v. Ruddy, [2007], UKPC D2, (2008) E WLR 608, par Lord Bingham of Cornhill.

operational points that configure the projection of a confirmation of criteria that express the jurisprudential cases. This happens in the hypothesis that the length of time is excessive and does not justify other reasons, such as for example the objective complexity of the case which reaches the point of paralyzing a proceeding bordering on exceptional cases.

The severity of the sanctions does not prove that the accused benefits from the fair trial of the punitive claim, which resolves the attack on the morality of justice. The prejudice for the accused forces the judge to evaluate the procedural fairness guaranteed through remedies which are suitable for the mitigating criteria for the commission of the jury, final evaluations, tests which put the criminal trial to follow the final arrest.

The delay in bringing the action can also be linked to a procedural defect and to the elements of abuse. In the Anglo-Welsh system, the ius receptum and the exercise of criminal action are accompanied by the accused, being granted the concrete possibility of carrying out an adequate defence.

This principle places as a prejudice the delay of the process which includes the memories that fade over time and the re-enactment of the facts to necessarily replace the reconstruction of the same, as a reasonable element that deprives the genuineness of a memory through the words of a heads

(Spencer, 2016)[31].

The uncertainty of procedural unfairness cannot be eliminated given that the prejudice of an unjust conviction is not connected with the terms of the evidentiary phase. We must ask the judge for the reconstruction of the fact that operates before the jury in terms of the acquisition of evidence. The actual impossibility of a fair trial has to do with the substantial risk that the accused does not benefit from the possibility of defending himself correctly and precisely[32].

This type of risk is high especially in trials where the accusatory construction clarifies the declarative evidence[33]. The preconceived evidence at the moment it is formed remains over time and produces memories that provoke emotions in the heart of every physiological witness (Schneider, 1968).

The situations are variable and exemplify the passage of time that affects a physical reality, where changes are inevitable in the state of the places that crimes occur. Delays are unavoidable due to the operational inefficiency, that creates documentary evidence, as a reason that technically ascertains this evidence with a reliability that is not precarious.

The fairness of the trial and its length of time allow us to speak of a moral deplorability of a punitive nature. The evaluation of

31R v. S, [2006], EWCA Crim 756, (2006), 2 Cr App R 23, p. 341.

32Cooke v. Purcell, [1988], 14 NSWLR 51, 87; Gill v. Walton, [1991], 25 NSWLR 190; Herron v. McGregor, [1986], 6 NSWLR 246, 254.

33Doyle v. Leroux, [1981], RTR 438.

the probability of an unjust conviction prejudices, from a technical point of view, the accused, who is unable to find an adequate defense (Herring, 2018)[34].

Consequently, the public image of the accused is inevitably negative from a personal, psychological point of view having to do with the the negative radical modification of his living conditions.

This interpretative path identifies specific conditions where the interest in the repression of crimes yields to a single system. As a criterion, criminal justice is considered, which represses the crimes but at the same time identifies the person responsible for the fact, blaming the conditions of the consciousness of the error which affirm the time but justifying the arrest of the proceedings since the conviction does not lead to a social therapeutic title[35].

(Follows): Double jeopardy and its own ban

The ban on double jeopardy is an element of anti-abuse enforcement. In the Anglo-Saxon legal system, the general prohibition is prosecuted twice for the same fact (Jackson, Johnstone, 2005).

This is a principle that substantially respects the many facets of common law and expresses the need to avoid a conviction or

34R v. Telford JJ, [1991], 2 WLR 866, 876-7; R v. Buzalek and Schiffer, [1991]; R v. Norwich Crown Court, ex p Belsham, [1992], 95 Cr App R 9, 16-17.

35R v. Mill, [1986], 52 CR (3d) 1, 91-2.

guilt by suffering the risk of a second conviction. The instrument has a repressive nature for the authority in the face of criminal manifestations which are met with acquittal as a phase of a criminal trial.

According to the jurisprudence the prohibition of double jeopardy is:

"(...) a person in double jeopardy may increase the chances of his or her being convicted even though innocent, and will also undermine the moral integrity of the criminal process. The accused may, as a result of having revealed his complete defence at the first trial, be at a greater disadvantage at the second trial and thus less able to defend him or herself effectively. Irrispective of this, it is in any event morally objectionable to subject someone to the embarassment, expense and anxiety of a second prosecution, with the possibility that a verdict might be returned which is ought to be borne in mind when considering stays of proceedings in the double jeopardy context (...)" (Choo, 2008).

The principle is connected with fairness, as a practical requirement, that avoids the judgment of the defensive strategy, which reduces the previous one.

The danger of an unjust conviction as well as a disparity of weapons between the defense and the prosecution is a ratio that regulates the guarantee sign in a unique way, thus avoiding double trial convictions for the same fact, ensuring the economy of the judicial system:

"(...) the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense (...)"[36] (Friedland, 1969; Moore, 2010).

The economy of the judicial machine is also linked to the

36Green v. US, [1957], 355 US 184, 187-8.

principle of legitimacy. This protects the individual from a sentence that is not fair at a second trial for the same fact, who is already judged at a proceeding for the same matter.

The double jeopardy rule is in line with the operational articulation of the abuse of the process, completing a setting that offers the opportunity to the individual, who appears innocent to shelter his own judgment as a lack of economic resources of a predisposition of the defensive strategy that determines the departure of unequal weapons, i.e. the intrinsic policy which aggravates the hypothesis of a trial having been established and the accused having been acquitted.

The public interest does not subject the individual to a second judgment for the same fact (extrinsic policy), thus providing a precise dimension for such reasoning by showing that the accused suffers a limitation of personal freedom (Friedland, 1969; Choo, 2008).

As the doctrine in question also states:

"(...) a defendant is (…) when invoking the pleas in bar (…) reminding the state-as the community's representative, the community in whose name the business of criminal justice is done-of the limits of its power. The defendant speaks as a member of the political community and her claim is something like this: "Having once submitted to the process of justice in relation to this offence, and having been duly acquitted (or convicted and punished, as the case may be), your (political, moral) jurisdiction to subject my conduct to examination in criminal proceedings is exhausted. My citizen's duty is done, and I am beyond your reach" (…) this is the special value of finality in criminal proceedings, and the principal rationale underpinning double jeopardy protection (...)" (Roberts, 2000; Bruce, Green, Levine, 2016; Brown, 2018).

This practice, in the Anglo-Welsh system, protects the autrefois acquit or autrefois convict (so-called plea in bar) since this protects the risk of a second judgment for the same fact that was previously acquitted.

Protection is also connected with the practical emergency of jurisprudence, as a form of subsidiary protection, where the abuse of process constitutes an appropriate tool. If the plea in bar is translated into an absolute right for the accused, this does not apply to the second. The protection of the ne bis in idem is invoked at every level of proceedings thus providing the interested party with a waiver of the responsibility of the accused without, however, denying the judge the ex officio power to proceed in good order[37].

Limiting the objective area and making it inapplicable remains a hypothesis that goes outside the scope of operation. The elements that identify the defining aspects are part of the same offense. As can be understood, the concept of fact is part of the Anglo-Saxon legal system in the factual core which is substantially the same as a semantic extension of the same offence.

The Connelly v. DPP case[38], which is based on a twofold armeneutic reason. The judge was asked to take a position on the concept of the same offense without including only the

37Connelly v. DPP, [1964], AC 1254, 1305, for Lord Devlin.
38Cooper v. New Forest District Council, The Times, 19 March 1992.

evidentiary material from the prosecution, as happened in the first trial. Thus, a useful element has been created.

This violates the prohibition of double judgment which does not constitute a decisive element. The same witness refers to a robbery after a murder[39]. It was not so much the element of the intended identity of the fact but the question that could not be right given that crimes are connected from a material and chronological point of view and are subject to investigation every time the conduct is distinctly divided[40].

The same offense allows the start of a trial for an event that is related to a criminal proceeding and the accused is legitimately convicted. Hence, it is stated that for a trial there is no conviction for a fact that was contested but for a conduct that affirms responsibility in the face of a renunciation of the exercise of the action of the same matter.

The charge was formulated by the same prosecutor in the first trial, making Connelly accused of murder and then of manslaughter. The jurors are expressed at the conviction and in the accusatory hypothesis founding a tacit acquittal for the second which was based on a plea in bar for autrefois acquitted

39[1964], AC 1254, 1305, par Lord Devlin.

40DPP v. Humphrys, [1977], AC 1, "(…) where the accused, judged and acquitted by the crime of driving without a valid license of a motor vehicle, was subjected to a second judgment for false testimony (perjury) and there condemned, although the defense had submitted a request based on the double jeopardy rule (autrefois acquitted), supporting it on the basis of the consideration that the "decisive" proof in both procedures was the same (testimony of the police officer who would have detected the infraction of the prejudice) (...)".

(King, Wright, 2016).

The prohibition on a new trial had to be considered effective even in the situation where the prosecution is aware of the fact, i.e. of the robbery, thus constructing the object of the charge at the time of the trial and as it deliberately postponed the persecution.

A general criterion has been added and it is that of the fact-crime, which challenges the second judgment where the same is and has the same respect to the object, which is previously ascertained and where the judge verifies the evidence within the scope of the proceeding, establishing a sentence within the first. From a technical point of view, the logic evokes the investigations which are placed in a prejudicial relationship which are faced with an identity of factual event, i.e. of violation of the ne bis in idem such as the acquittal of the accusation which does not entail the acquittal for the second[41].

The profile concerns the relative exceptions to the double jeopardy rule given that in the first we have the hypothesis of a punishable crime and a sentence of acquittal which was referred to a crime which could have become annulled when illicit pressure was achieved against a member of the jury and/or a witness unless the reopening of the criminal proceedings for the first offense was time consuming and contrary to the interests of

41Connelly v. DPP, [1964], par Lord Hodson.

justice (Mcalhone, 2013)[42].

The second included criminal categories that were characterized by a significant social alarm, i.e. intentional or negligent homicide, kidnapping, sexual violence, etc., and a new evidence is discovered for a person acquitted of one or more crimes and where the prosecutor, through subject to written authorization from the director of public prosecutions, is not contrary to the interests of criminal justice and can request a previous acquittal for the reopening of a criminal trial contrary to acquittal.

The boundary was clear through double jeopardy and ne bis in idem and it was concentrated on the rule of the prohibition of double judgment, declining to a judicial seat not applicable to the case in question, where heterogeneous situations, as exceptions to the principle through a ruling on the merits for a concrete fact could be the subject of a second persecution, which was not equivalent to the annulment due to procedural defects of a sentence of conviction for one fact with another, which was promoted for a second trial.

The abuse of process was called for the refusal made by the judge when applying the ne bis in idem as a last resort remedy for the gaps in protection that are left to the latter.

The prosecution has the obligation to institute a single criminal trial for all the crime(s) and the intention to pursue a modus

42Criminal Procedure and Investigations Act 1996, Section 54.

procedurandi contrary to the collective interest of the repression of the crimes allowing to the magistrate to choose the repression of crimes through separation of proceedings. In our case we cannot speak of an abuse of the process but of a process which did not create a risk of unjust conviction for the accused and did not constitute the characterizing morality of the system in the face of a criminal trial which had as its object serious forms of delinquency.

The abuse of the process creates a useful tool for situations that limit the prohibition of the second judgment and are configured as a sort, that complete the protection projected by the second. A further relevant principle is the stopping of the proceedings, as a remedy requested by the defense and is abstractly practicable because it reiterates to the judge in an exceptional way a configuration of the abuse of process, as an institution outside the double jepoardy rule, as a judicial instrument capable of covering the gaps, which are left to an express rule.

(Follows). Entrapment

Referring to entrapment we cannot talk about protection and/or a precise object (Choo, 2008)[43]. The protection of this distorting practice is the result of extensive jurisprudence due to a negative connotation given that it evokes entrapment in an immediate

43R v. Looseley, [2001], 1 WLR 2060, HL, par Lord Hoffman.

image which in an exemplified manner respects clinical manifestations of abuse, of authority towards the individual, where:

"(...) occurs when an agent of the state-usually a law enforcement officer or a controlled informer-.causes someone to commit an offence in order that he should be prosecuted (…) (Ashworth, 2002; Simester, Spencer, Sullivan, 2014) the use of deceptive techniques to test whether a person is willing to commit an offence (...) the judicial investigation, aimed at reconstructing whether or not abusive conduct occurred, will be determined by the individual circumstances of the specific case. For this reason, it could rightly be said that, if on the one hand we are faced with a malleable (if we want so) figure, where the discretion of the judge has (more than ample) room for manoeuvre, on the other hand, there are significant difficulty in reconstructing the general contours of a rule that physiologically escapes conceptual generalizations; or to put it more effectively: each case turns on its own facts (...)" (Young, Summers QC, Corker, 2014).

This is a widely debatable topic especially in the field of narcotics, trafficking and terrorism, involving a high number of judicial cases that address the topic of entrapment as inherent to the delimitation of boundaries between practice and theory.

The entrapment is not part of any legal provision expressed in a regulation that establishes elements of protection. Only the common law system is enough to differentiate the treatment of a regime in the matter which finds in the Anglo-Saxon system a criminal law that specifies exactly the institution (Ellis, Savage, 2012).

The jurisprudential analysis in question can be found in Anglo-Welsh practice where it is clear that the recognition of protection of the accused in the face of serious conduct by the authorities is not free but is delimited through limits that are

found in the justice of the defense and in a dual order under the fight against crime, the decrease in the effectiveness of very serious forms of delinquency, the form of protection that leads to the consequence of the abuse of the process and the arrest of the proceedings as a fact that involves all the judgments of a prosecution that concretizes the action, the admission that is caused by an agent who is in cover and in the related statements of the witness-agent (Allen, Luttrell, Kreeger, 1998; Smith, 2005; Carlon, 2007; Lai Ho, 2011; Marcus, 2018)[44].

We recall on this topic the R v. Sang case (Maguire, Mellors, 1996; Gill, 2000; Asworth, Redmayne, 2010; Quirk, 2016) in the matter of entrapment. A case that is far from the remedy of stopping the proceedings where the use of exclusion through the undercover operation of a police officer leads to the reduction of the sentence.

The first conviction was discarded[45] given that the evidentiary material of an exclusive trial by the prosecutor had inevitably but substantially led to the de facto defense, of an Anglo-Saxon system, to reflect on various alternatives, where the residual solution was the mitigation of the sentence which is applied with the condemnation.

44Sherman v. US, [1958], 356 US 369; Matthew v. US, [1988], 108 S Ct 883; Jacobson v. US, [1992], 112 S Ct 1535.

45[1980], AC 402. and in the same spirit see also: R v. Tonnessen, [1998], 2 Cr App R, 328; R v. Springer, [1999], 1 Cr App R, 217; R v. Shannon, [2001], 1 WLR 51, 73.

The argument is perplexing given that the mitigation of the quantum poenae does not constitute a remedy to cancel the conduct of a police officer without the interference of the criminal dynamics, where the accused fact was committed by the accused, making the trial constructed by the same authority and the evidence obtained from the entrance to have an exclusive character, decisive for the conviction where the defense and prosecution do not use equal weapons.

The parties following the Anglo-Saxon judicial practice as a recognition of precise protection are based on the protection system of the European Court of Human Rights (ECtHR) (Rainey, Wicks, Ovey, 2021; Villiger, 2023)[46] which states that:

"(...) the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug-trafficking (…) the right to a fair administration of justice holds such a prominent place that it cannot be sacrificed for the sake of expedience (...) the public interest [see: persecution of offences] cannot justify the use of evidence obtained as a result of police incitement (...)" (Liakopoulos, 2019b; Villiger, 2023)[47].

The principle of procedural fairness highlights a harmony between the European Convention of Human Rights (ECHR) and the Anglo-Welsh legal system where fairness constitutes a rigid value that is insusceptible with the balancing of opposing interests. We are faced with a conceptual substance of the same coin given that the part, that puts the moral integrity of the system and fairness, is concretized in ensuring a process that

46ECtHR, Texeira de Castro v. Portugal of 9 June 1998.
47ECtHR, Texeira de Castro v. Portugal of 9 June 1998.

plays according to equality of arms guaranteeing art. 6 ECHR, as a flower of guarantees recognized to the accused, as minimum standards in the national justice system, prefiguring basic conditions for a criminal proceeding, where the accused has the effective possibility of carrying out his own defence. In other words, the work of the police officers was illegitimate by affirming an undue conduct determining the crime to a practice that prohibits the overall fairness of the criminal trial (art. 6 ECHR).

The Strasbourg judges had to check whether the Texeira case was part of an autonomous intention with respect to the crime and/or whether it was the result of an induction by the appellant to commit the same where his own interference constituted a sine qua non condition in the drug affair.

From the documents no element pointed to a reconstructive hypothesis which played in the opposite direction of elements who obtained the drugs from a third person, thus explaining the actions of the undercover officers, necessary for carrying out investigations leading to a true criminal incitement[48].

The construction value regarding entrapment signaled the fundamental need for undercover operations within some precise limits. Pass the Regulation of Investigatory Powers Act (2000) (Sanders, Young, Burton, 2010; Grabenwarter, 2014; Ziegler,

48ECtHR, Vanyan v. Russia od 15 December 2005; Khudobin v. Russia of 26 October 2006; Ramanuskas v. Latvia of 5 February 2008.

Wiks, Hodson, 2015; Settem, 2016; Seibert-Fohr, Villiger, 2017; Pitcher, 2017; Villiger, 2023) means a composition of predictions that have as their objective the conditions of legitimacy of undercover police interventions (Mckay, 2005)[49].

The supranational precedent is also based in R v. Sang Approach case, as an interpretative itinerary of scenarios that signal a step towards the opportunity of the entrance institution's own exclusionary rule. The need to ensure fair trial and to exclude undercover operations are part of the Police and Criminal Evidences Act 1984, Section 78 where the judge has the power to exclude evidence which is obtained unlawfully[50].

The invalidation of the accusatory claim is perhaps excluded by the fact that they achieved acquittal as noted in R v. Latif case (Ashworth, 1998; Liakopoulos, 2019a)[51]. A case where the entrapment process experienced an expansion given that the power to block the procedural process was sanctioned, for the first time, when the work of the investigations compromised the fairness of the process by creating a judgment, that was contrary to justice and the moral sector, that includes one's circle. The

49"(...) an undercover operation may be authorized if it is deemed to be well founded that: a) the adoption of such investigative means is proportionate to the outcome of the expected investigation; b) it is necessary for the interests of national security, or c) it is necessary for the prevention or repression of the crime or to prevent unrest; d) it is necessary for the protection of the interests of the national economy, or e) for the protection of public health or for the repression of tax evasion or, lastly, f) when recourse to such means is requested by order Secretary of State (...)".

50R v. Smurthwaite, [1994], 1 All ER 898.

51[1996], 1 WLR 104.

details of the case allow us to speak for a problematic nucleus, where the balance of two different instances moves.

The evidence that automatically provides the capture of the instigator-agent compromises the collective protection of forms of crime, also excluding in the eyes of the public conscience the opinion that justice tolerates abuses and police forces through practice. Perhaps an intermediate path was that of judicial discretion. The related trial also had a moral basis as we note that:

"(...) the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscienceand requires the criminal proceedings to be stayed (…) in a case such as the present, the judge must weigh in the balance the public interest in esuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justified any means (...)" (Picering, Mcculloch, 2012).

Jurisprudential practice that we also see in R v. Looseley case, A-G's Reference (No 3 of 2000)[52]. A case that represents the interpretative evolution of the Anglo-Saxon theory of the transposition of principles that are enshrined (as we saw in the Texeira de Castro v. Portugal case). A case that allowed us some key factors in prison abuse such as: the complexity of a criminal investigation and the nature of the crime; undercover operations and their reasons; the concept of causal contribution which allows the police to commit the crime; for the purpose the defendant's precedents as calculable points. These are key points

52[2001], UKHL 53, 1 WLR 2060.

for the evolution of jurisprudence as well as interpretation relating to the topic (Ashworth, 2002; Lewin, 2001; Mckay, 2002; O'Doherty, 2002; Jerrard, 2002; Omerod, Cyril Smith, Hogan, 2011, Harfield, Harfield, 2012; Amos, 2014).

(Follows): Lost or Destroyed Evidence

The dispersal and/or destruction of evidence in the abuse of process theory is important, as starting role in a criminal case. The topic constitutes the principle of equality of arms between defense and prosecution (Corker, Summers, Young, 2014), thus translating the balance of police work during the investigative phase and the defensive strategies during the actual judicial phase.

This is an argument that is connected with the principle of legitimacy, which imposes the repression of crimes on the persecution of the guilty, thus stigmatizing the ethical and legal evil of a conviction for an innocent person. The claim was not the elimination of risk but the minimization of a double medal tension. On the one hand the law and on the other the judicial discretion which find in the abuse of the process informative mechanisms for this principle, intervening thus at the boundaries of equity, in a situation that causes the abuse of authority. The precedent is a fundamental argument that establishes the relevant points of discipline as we can also see in R (Ebrahim) v.

Feltham Magistrates' Court (Dodds, 2001; Martin, 2005; Smith, 2007) case[53].

The proceedings were stopped due to an inequity, as a remedy which was exceptional to the sterilizing capacity of a criminal trial, as we have seen in the case of the Police and Criminal Evidence Act 1984, Section 78, which regulated the judicial power of evidence in court and the exclusion of an equitable mechanism. The adoption of sanctions will be the task of the judge to check at a preventive stage the procedural fairness in a sufficient way through the exclusion of evidence of the accusation with a direct way to the lost discharge.

The reasonable nexus of the operation of the abuse of process is a qualifying element. So we are outside procedural rules. The probability of an unjust conviction is intolerable as there is no interest in a persecution in line with the public interest and in the cessation of criminal persecution. Beyond any reasonable doubt is the finding that is based on the subjective nature where bad faith and serious fault for the prosecutor and/or the police also means the loss of a proven contribution.

Thus we find ourselves on an anti-abuse application path where the rejection of the defense's request for arrest in the trial for unfairness loses the evidentiary contribution and does not undermine the overall procedure considering that the presence

53[2001], EWHC Admin 130, 1 WLR 1293.

of evidentiary data is evaluated by each jury (Welch, 2014; Huxley-Binn, 2014)[54].

The adverse publicity

Speaking of adverse publicity we are faced with a double prejudice for the accused. The strepitus fori risks putting the same at a median where the criminal trial is accompanied by a further procedure which is quite harmful for a criminal proceeding in the public opinion.

Public opinion can often pollute the impartiality of the judge, thus revealing a part of the discussion which is not finished and which is perhaps in progress. Common sense directs us towards specific situations where influence is exerted on the criminal judge during the debate. This is a median which may not pollute the evidence but put into difficulty the fairness of the procedure itself where a trial replaces the guilty party ab initio. The anti-abuse ratio does not allow it and the application of scenarios are evoked in an abstract way.

Identifying cases under the influence of intolerable levels undermines procedural fairness where the assessment takes the form of a psychological investigation of the members who are part of the jury. Thus, we can affirm of a distorted trial by creating untrue premises for the accused and the iudex suspectus

54R v. Beckford, [1996], 1 Cr App R 94, 103; R v. Taylor, [2001], EWCA Crim 1106; R v. Elliott, [2002], EWCA Crim 1199.

is oriented towards a negative judgment due to the impartiality of the judge.

The factors addressed for this purpose have to do with the diffusion of news that is inherent to the territorial location of a media debate to the subjective nature, which constitutes the information that is relevant to the jury (Griffiths, Mckeown, 2012; Storey, Lidbury, 2012; Monaghan, 2018)[55].

The anti-abuse remedy in this case is essential to the appeal and the prior negative judgment, insufficient for any solutions of an intermediate nature, such as the caveat, which the judge provides to the jury.

Remedies of an intermediate nature, which reflect that the majority hopes to avoid, stopping the proceedings, thus constituting a vicious circle, where the judge tries to send the jury to consider public opinion in relation to the crime as the object of judgement, as an effect that results from the confirmation of the conditioning of the impartiality of the jurors.

Thus, the sentence risks being unjust and above all outside of procedural inequity. The operational articulations of the abuse of process find application to the logic of the media hype for each defendant which constitutes a moral integrity of justice to the extent, that finds the interested party subject to a real penalty of an extra-criminal nature.

55R v. Mc Cann, [1991], 92 Cr App R 239, 253; R v. Taylor, [1994], 98 Cr App R 361, 368; R v. Abu Hamza, [2006], EWCA Crim 2918, [2007], QB 659.

Breach of Promise

In the investigation phase for a criminal trial, any agreement with the authority, through a prosecutor and the suspect, promotes criminal action. The counter-performances, that arise, may be different due to the commitment to collaborate with justice.

The violation of this prosecution, through the breach of undertaking, creates a relative non-logical distortion to the structure of the Anglo-Welsh legal system, where the prosecution is in line with the object of assessment, which is discretionary with the Crown Prosecution Service. It is not necessary to note the reasons for a systemic option but it is sufficient only to observe that the conduct is incorrect with the authorities and the abuse of the criminal process highlights the breaking of the agreement as a choice of a unilateral nature to the authority in a simultaneous way, as fundamental interests to the operational articulations of the anti-abuse doctrine. Receiving a commitment from the prosecutor's side is not enough to be a promise, a renunciation that cultivates a defensive strategy for a trial that will follow in the near future. This is a position that inevitably deteriorates the accusation towards a risk that the sentence is thus unfair. And we say this since the authority can also deny the punitive claim ab origine

thus neglecting the evidence and so the sentence will obviously be without doubt:

"(...) to constitute an abuse of process to proceed with a prosecution unless: a) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and b) (...) the defendant has acted on the representation to his detrimen. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation (...)"[56].

But this is a case of bad faith on the part of the authority. The exercise of every criminal action is part of every prosecutor of the case. The same also happens with the promise not to prosecute by the police, thus constituting an abuse of process as well as an ultra vires act.

The objective data is precise and relative to the promise that was made by adopting decisions that abandon any prospect of self-defense to an established trial at one's own expense[57] where any finding of bad faith can only go beyond the judgment of a disapproval on the part of the judge and with regard to a profile of integrity of a moral nature for justice, thus leading to the loss of fundamental collective interests for the persecution of the guilty.

Faced with the risk of an abuse of process, the prejudice continues to be that of the interested party. When the authority renounces, pursuing the collaboration of the accused, as a

56R v. Abu Hamza, [2006], EWCA Crim 524.

57R v. Croydon JJ, ex p Dean, [1993], QB 769; A-G of Trinidad and Tobago v. Phillip, [1995], 1 AC 396.

witness of a potential nature (prosecution witness)[58] it is indicated that any participants in the crime, implicitly or otherwise, renounce to the interested party any further self-defense of an active nature at every criminal trial.

The commitment of the authority is the criminal case against one, where verifying the missing promise leads the accused in a determined way to different paths, that is, to non-collaboration with the authorities and what has been established.

Thus the Anglo-Saxon penal system is plausible as a matter of prohibition of abuse.

By regulating this opportunity, through legislation and/or with an interpretative way, the dogmatic category of the actual terms of a problem that manifests inconvertible data is demonstrated in a single way, where the tendency is the risk of going unbalanced every temptation that discusses the related issues and ends up solving one view of the unreasonable duration of criminal trials, thus stigmatizing the criminal system as well as the defense which is distressed during the trial process.

These are issues, that are not immediately connected with the abuse of the process but represent an appropriate position of a mosaic that is excessively limited outside the sources of hermeneutic and prospective strabismus.

This resolves the problem of delegation to a jurisdiction which

58R v. Croydon JJ, ex p Dean, [1993], QB 769.

is equivalent to an inability of a system that offers a response to the phenomenon in question, i.e. the relative limits to procedural legality (Mcewan, 2011; Edwards, 2015; Marsh, 2015; Mcconville, Marsh, 2015).

This means the declinations of rigid principles that do not allow ways out and the real mistake is to address the issues of abuse through the lens of legality that resolves the practical act of an unsuitable instrument.

These conservative approaches have too strong a legality given that they demonstrate a genuine desire to safeguard the pillars of the system. The ideology of a practice that produces acts consistent with the abstract model of legality has a powerful political impact.

Automatic legal operations predetermine the practice of a legality that reaches the precipitate that does not correspond to legality. Thus, it does not reach the point of disavowing a role as an axiom, where the natural instrument of expression is legislative and less interpretative activity.

The difficult issues that are linked to the lack of information and constituent elements, which contest the need for tendential conformity of the practical result of the basic rule and the practice, show the need for a dogma that starts to offer a system of self-protection tools finding connection to written law.

The abuse of the process conceives the key to reflection, as a

weapon capable of disintegrating the legality of a principle, where the forms are silence directed at procedural conduct, which is a reasonable logic that goes beyond individual guarantees of protection. The interpretation is similar and true with excessive boldness where the internal legal system does not show openings to the direction followed.

Following this path we demonstrate that the profiles of inefficiency and dysfunctions in practice are technically impeccable to the experience that constructs in a destined way the gaps that end up at the functional or not basis of every penal system at a national or international level.

The required prudence imposes an interpretative model where the hypotheses introduced require a margin that becomes a ius receptum that takes note of current cultural contingencies like a white horse that enters the new leaving the changes that in reality are the same (Jackson, Summers, 2012). This perspective dimension plays the role of a rational control over the change in time.

Concluding remarks

From what we have understood from the previous paragraphs, it is clear that when we talk about abuse of process we do not have a written law on the matter but we are dealing with the discretion of criminal action which implies the abuse of

procedural instruments in a general way before the stages of a process.

The central element of the jurisprudential reconstruction is discretion, i.e. the anti-abuse appeal as an object that organizes, with a discretionary manner on the part of the judge, a spectrum that concerns sanctioning measures as options leading to the adoption of the principle of legitimacy which is irremediably compromised. Abusability of the process which in a direct way has to do with procedural parties who dispose of a criminal trial, where the prosecution is the plaintiff capable of polluting the fairness of the procedure. The voluntas persecuuzionis also includes the imbalance between the parties that are necessary for a process with the capacity to abuse.

The arrest of the trial creates a remedy of an exceptional nature which includes reasons that can paralyze the punishments of a sensitive collective interest in the repression of crimes. We are faced with a scenario that is confused with the capacity of a criminal trial where in itself tools are available and adequate for the general guarantee of fairness, thus amending the procedural process. Trust in a procedural system represents a fair summary that includes the needs of discovery for the truth and the protection of guarantees.

The theory of abuse of process is based on a dialectic that signals the adoption of a fundamental caution by a system where

the process is modulated. Every truth always has a relative price which often becomes unbearable. It is not far-fetched to say that the abuse of process can have as its sole citizenship not a national and/or international penal system but the accusatory one.

The correctness of a reconstruction, through the Anglo-Saxon system, is a tool that offers in a susceptible way the importation of a procedural system that allows us to reach the conclusion that the latter regarding the abuse of the process can and becomes borrowed.

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